

IN THE CIRCUIT COURT OF HOT SPRING COUNTY, ARKANSAS

STATE OF ARKANSAS

PLAINTIFF

VS.

CR 90-91

TIMOTHY D. JENSEN

DEFENDANT

JEAN DUFFEY

RESPONDENT

MOTION TO QUASH WARRANTS

Comes the Respondent, Jean Duffey, through her attorney, Jeff Rosenzweig, and for her Motion to Quash Warrants states:

1. As of the preparation of this motion, there appear to be two warrants issued for the arrest of Respondent Jean Duffey. She hereby moves that two warrants issued for her arrest be quashed for the reasons outlined in this motion. This pleading does not deal with the many meritorious substantive defenses which Duffey would have to any charge or allegation arising from this matter, but rather merely with the fatal deficiencies in the warrants.

Facts of the case.

2. The facts of this case are as follows:

(a). A subpoena was issued on February 1, 1991, for Duffey to appear as a

witness in *State vs. Timothy D. Jensen* in Hot Spring Circuit Court on February 7, 1991. It was never served on her. (Exhibit 1 to this motion)

(b) On February 7, 1991, another subpoena was issued for her to appear as a witness in *State vs. Timothy D. Jensen* on February 11 and 12, 1991. The court also ordered that the "time requirement for any subpoena for any witness...is hereby waived and set aside." This subpoena was not served on her either. (Exhibit 2 to this motion)

(c) On February 15, 1991, the Court heard a motion to hold Duffey in contempt for "willful avoidance of subpoena." Duffey was not present and had not been served. The Court made a finding "That the witness Jean Duffey has willfully and intentionally avoided service of a subpoena compelling her to testify on behalf of the Defendant." The Court ordered that a subpoena be issued for Duffey to appear on March 4, 1991 at the *Saline* County Courthouse. The Court also ordered that if she did not pick up the subpoena by February 22, 1991, that a warrant of arrest would be issued. This Order was filed on February 21, 1991.(Exhibit 3 to this motion)

(d) The aforementioned subpoena was issued on February 19, 1991 to appear on March 4, 1991. It was never served on her either. (Exhibit 4 to this motion)

(e) On February 28, 1991, a bench warrant alleging the offense of "Failure to Appear" was issued. No statute number was given on the warrant, nor was a new case number assigned. Notations on the warrant indicate that it was entered in the NCIC

computer on February 28, 1991. (Exhibit 5 to this motion)

(f) On July 17, 1991, another Bench Warrant was issued in the same case number. This alleged an offense entitled "Contempt--failure to appear, willful avoidance of subpoena." (Exhibit 6 to this motion)

3. Duffey has not been arrested on the warrants.

Legal discussion.

4. However the circumstances of this case may be characterized, the warrants for Duffey's arrest must be quashed.

5. The charge of "Failure to Appear" as represented by the February 28, 1991, warrant, is wholly illegal. The criminal offense of Failure to Appear, by its very terms, is restricted to persons previously charged with an underlying criminal offense. It does not apply to witnesses or potential witnesses, a fact which the issuing authorities seem to have implicitly recognized that fact by issuing the later contempt warrant. Ark. Code Ann. 5-54-120 provides:

(a) A person commits the offense of failure to appear if he fails to appear without reasonable excuse subsequent to having been:

(1) Cited or summoned as an accused; or

(2) Lawfully set at liberty upon condition that he appear at a specified time, place, and court.

(b) Failure to appear is a Class C felony if the required appearance was to answer a charge of felony or for disposition of any such charge either before or after a determination of guilt of the charge.

(c)(1) Failure to appear is a Class A misdemeanor if the required appearance was to answer a charge of misdemeanor or for disposition of any such charge either before or after a determination of guilt of the charge.

(2) Failure to appear is a Class C misdemeanor if the required appearance was to answer a violation.

(d) This section shall not apply to an order to appear imposed as a condition of suspension or probation pursuant to Sec. 5-4-303 or an order to appear issued prior to a revocation hearing pursuant to Sec. 5-4-310.

8. Moreover, it appears that no formal charging instrument, such as an information, was ever filed. Therefore, even if Ark. Code Ann. 5-54-120 were to be misconstrued as being applicable to witnesses, the statute of limitations on the offense of Failure to Appear has expired. Ark. Code Ann. 5-1-109.¹

9. If this proceeding is characterized as a contempt of court matter, the statute of limitations has nonetheless expired as well. There appears to be no charging instrument other than the July 17, 1991, bench warrant. Because criminal contempt of court is a misdemeanor, Ark. Code Ann. 5-1-107(a)(3), a charging instrument would

¹ There is no statutory support for any assertion, should it be made, that the failure to appear could constitute a felony.

have to have been filed within one year. Ark. Code Ann. 5-1-109(b)(3) and (f). Even if Duffey had been continuously absent from the State, the period could not be extended for more than three years, this expiring during 1995.

10. Even if the writing on the warrant "Contempt--failure to appear, willful avoidance of subpoena" were to be construed as a charging instrument, it fails as a matter of law. It meets none of the formulations of criminal contempt contained in Ark. Code Ann. 16-10-108, which limits criminal contempt to those particular formulations, of which (1), (2) and (5) are wholly irrelevant and of which (3) and (4) are formulations different from that alleged in the bench warrant and which are factually inapplicable to the allegations against Duffey.

(a) Every court of record shall have power to punish, as for criminal contempt, persons guilty of the following acts, and no others:

(1) Disorderly, contemptuous, or insolent behavior committed during the court's sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority;

(2) Any breach of the peace, noise, or disturbance directly tending to interrupt its proceedings;

(3) Willful disobedience of any process or order lawfully issued or made by it;

(4) Resistance, willfully offered, by any person to the

lawful order or process of the court; and

(5) The contumacious and unlawful refusal of any person to be sworn as a witness and, when so sworn, a similar refusal to answer any legal and proper interrogatory.

11. "Avoidance" is not the same thing as "disobedience" or "resistance." A criminal statute must be strictly construed, and the abject failure to allege a necessary element is fatal to any charge. Nor can criminal contempt be justified under Art. 7 Sec. 26 of the Arkansas Constitution, which also refers to "disobedience of process."

12. The issuance of warrants without any information or affidavit violates Rule 7.2(a)(v) of the Arkansas Rules of Criminal Procedure.

13. It is also, of course, a violation of federal and state constitutional rights of due process of law and protection against illegal seizures, to issue a warrant without a charging instrument.

14. Moreover, in the event that it is alleged or ascertained that there is a valid charging instrument, the case must be dismissed on speedy trial grounds. Duffey has not been "absent or unavailable" to law enforcement to toll operation of speedy trial rules under Rule 28, A.R.Crim.P. Duffey has been living and working as a public employee (a schoolteacher) in Pasadena, Texas for five years, using her own name and social security number. She has visited her family in Hot Spring County generally twice a year. Among the law enforcement authorities who had specific knowledge of

her whereabouts and who met with her in 1994 were the Saline County Sheriff and a Deputy and an agent of the Federal Bureau of Investigation. Additionally the Police Chief of Malvern talked with her on the telephone while she was in Hot Spring County in 1993.

15. If this matter is to be characterized as a civil contempt, it must be dismissed. A citation for civil contempt is invalid if it is impossible to purge. *White v. Taylor*, 19 Ark.App. 104 717 S.W.2d 497 (1986). Since *State vs. Jensen* is closed but for this issue, it would be impossible to purge any alleged contempt.

WHEREFORE, Respondent Duffey prays that the warrants for her arrest be quashed.

JEAN DUFFEY



JEFF ROSENZWEIG

Ark. Bar No. 77115
300 Spring St. Suite 310
Little Rock, AR 72201
(501) 372-5247

Attorney for Respondent

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have mailed or delivered copies of the foregoing to Dan Harmon, Prosecuting Attorney, P.O. Box 999, Benton AR 72015, Hon. John W. Cole, Hot Spring County Courthouse, 210 Locust St., Malvern AR 72104 this 22 day of January, 1996.


JEFF ROSENZWEIG

SUBPOENA IN CIRCUIT COURT

CRIMINAL

CR-90-91

THE STATE OF ARKANSAS

County of Hot Spring

}

ss.

THE STATE OF ARKANSAS, TO THE SHERIFF OF HOT-SPRING

County, Greeting:

YOU ARE COMMANDED TO SUMMON Jean Duffey

to appear before the Circuit Court of Hot Spring County on the 7th day of February
at 9:00A.M., 19 91 and testify on behalf of the State in
an action in said Court between STATE OF ARKANSAS, as Plaintiff and Timothy Jensen

Defendant

WITNESS my hand and seal of said Court this 1stday of February19 91JAMES O. BIRCH

Clerk

By Ruth Finley D. C.

Ex 1

#317 SUBPOENA IN CIRCUIT COURT

CRIMINAL CR-90-91

THE STATE OF ARKANSAS

County of Hot Spring

vs.

THE STATE OF ARKANSAS TO THE SHERIFF OF...HOT SPRING...County, Greeting:

YOU ARE COMMANDED TO SUMMON Jean Duffey

778-0106

to appear before the Circuit Court of Hot Spring County on the 11 & 12th day of February
at 9:00 AM, 1991 and testify on behalf of the State in
an action in said Court between STATE OF ARKANSAS, as Plaintiff and Timothy Jensen

Defendant

WITNESS my hand and seal of said Court this 7th

day of February, 1991

JAMES O. BIRCH

Clerk

by Ruth Ginkley

D. C.

Ex. 2 p. 1

FILED IN CIRCUIT COURT
CIRCUIT NO CHANCERY
CLERK

'91 FEB 7 PM 2 19

HOT SPRING COUNTY, ARK.

BY *Ruthie Finley*

IN THE CIRCUIT COURT OF HOT SPRING COUNTY, ARKANSAS

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. CR. 90-91

TIMOTHY D. JENSEN

DEFENDANT

ORDER

The Court hereby Orders that the time requirement for any Subpoena for any witness in this cause is hereby waived and set aside. Any person receiving a Subpoena is required to attend at the time and place stated.

IT IS SO ORDERED.

[Signature]
JOHN W. COLE, Circuit Judge

DATE *1-7-91*

Ex. 2 p. 2

IN THE CIRCUIT COURT OF HOT SPRING COUNTY, ARKANSAS
STATE OF ARKANSAS

VS.

TIMOTHY D. JENSEN

NO. CR 90-91

FILED JAMES D. BIRCH
HOT SPRING COUNTY, ARK.RY
ORDER

FEB 21 AM 9 58

PLAINTIFF

DEFENDANT

Now on this 15th day of February, 1991, comes on for hearing the Motion for Contempt filed herein by the Defendant asking that this Court hold Jean Duffey in Contempt for willful avoidance of subpoena and from the testimony of Saline County Deputy Sheriffs Mallory, Scheuffler, Childress, and Lewis, and the testimony of Carl Carlson and James Duffey and other evidence presented to the Court, the Court doth find;

1. That the witness Jean Duffey has willfully and intentionally avoided service of a subpoena compelling her to testify on behalf of the Defendant.
2. That a subpoena shall issue forthwith for her to appear and testify at a Hearing on Defendant's Motion for Stay of Proceeding and for Dismissal to be held on Monday, March 4, 1991, in the Circuit Courtroom of the Saline County Courthouse at Benton, Arkansas, at 9:00 A.M.
3. The Court has advised James Duffey, the witness' husband, that the subpoena shall be held at the office of the Sheriff of Saline County, Arkansas, and Jean Duffey is Ordered to accept service of the same on or before Friday, February 22, 1991, at 5:00 P.M.

S-729

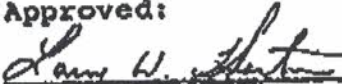
Ex 3 p 1

4. In the event Jean Duffey fails to contact the Saline County Sheriff's Office and accept service of said subpoena prior to that time and date, a Warrant for Arrest shall issue for her.

IT IS SO ORDERED.


John W. Cole
Circuit Judge

Approved:


Larry W. Horton
Attorney for Defendant


Dan Harmon
Prosecuting Attorney

S-730

Ex 3 p2

390

SUBPOENA IN CIRCUIT COURT

CRIMINAL CR-90-91

THE STATE OF ARKANSAS

County of Hot Spring

THE STATE OF ARKANSAS, TO THE SHERIFF OF HOT SPRING

YOU ARE COMMANDED TO SUMMON

RECEIVED
SALINE CO. ARK.

FEB 19 PM 2 03

SHERIFF'S OFFICE

At the Saline County Courthouse

to appear before the Circuit Court of Hot Spring County on the 4th day of March
at 9:00 A.M. 19 91 and testify on behalf of the Defendant

an action in said Court between STATE OF ARKANSAS, as Plaintiff and Timothy Jensen

Defendant.

WITNESS my hand and seal of said Court this 19th
day of February 19 91

JAMES O. BIRCH

Clerk

By

Ruth Ainsley

D. C.

Ex 4

Set Court for 3/2/91 @ 9:00 AM
ENTERED NCIC 2/24/91 APPROX 1650

EW-91-34 (Ch)

RECEIVED
NOT SPRING COUNTY
DEPUTY

FEB 28 1991

AM
7, 8, 9, 10, 11, 12, 1, 2, 3, 4, 5, 6 PM

BENCH WARRANT

The State of Arkansas, to any Sheriff, Constable, Coroner, or Policeman in this State.

YOU ARE COMMANDED forthwith to arrest Juan Dufay, W/F, 5'2"

12016, Brown/Hazel, DOB 1/2/47
and bring her before the Hot Spring Circuit Court, to answer an indictment in that Court against her for the offense of failure to appear

of if the Court be adjourned for the Term, that you deliver her to the jailer of Hot Spring County.

WITNESS my hand and seal of said Court, this 28th day of February, 1991.

JAMES O. BURCH, Clerk
by Ruth Finley, U.S.

Ex. 5

01/08/1996 12:40

713-943-1030

JEAN DUFFEY

PAGE 07

NIC # W6621 36278

SRN # 1858422

EW-91-106

Ck-90-91

RECEIVED

HOT SPRING COUNTY

SHERIFF

DEPUTY

JUL 17 1991

BENCH WARRANT

ALL
7, 8, 9, 10, 11, 12, 1, 2, 3, 4, 5, 6

The State of Arkansas, to any Sheriff, Constable, Coroner, or Policeman in this State: 2,

YOU ARE COMMANDED forthwith to arrest Jean Duffeyand bring her before the Hot Spring Circuit Court, to answer an indictment in that Court against
her for the offense of

Contempt - Failure to appear, willful avoidance of subpoena

of if the Court be adjourned for the Term, that you deliver her

to the jailer of Hot Spring County.

WITNESS my hand and seal of said Court, this 17th day of

July

19 91

JAMES O. BIRCH

Clerk

By

Vatris J. Kelly

D. C.

Ex. 6